

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEROME LENORDA POWELL, II,

Plaintiff,

v.

WHATCOM COUNTY JAIL, et al.,

Defendants.

CASE NO. C22-0728JLR-TLF

ORDER

I. INTRODUCTION

Before the court are: (1) Defendant the City of Bellingham's ("the City") motion to dismiss Plaintiff Jerome Lenorda Powell, II's complaint (City MTD (Dkt. # 18); City Reply (Dkt. # 24)); (2) Defendants Whatcom County Jail and Breanna Brock's (collectively, the "Whatcom Defendants") motion to dismiss Mr. Powell's complaint (Whatcom MTD (Dkt. # 14); Whatcom Reply (Dkt. # 22)); and (3) Mr. Powell's motion for an extension of time (Mot. for Ext. (Dkt. # 25)). Mr. Powell, who proceeds *pro se* and *in forma pauperis* ("IFP"), opposes the Whatcom Defendants' motion, voluntarily

1 dismisses Ms. Brock, fails to respond to the City’s motion, and seeks a continuance to
 2 gather additional evidence. (Resp. (Dkt. # 21).) The court has reviewed the parties’
 3 submissions, the balance of the record, and relevant law. Being fully advised, the court
 4 GRANTS the City’s motion to dismiss; GRANTS in part and DENIES in part the
 5 Whatcom Defendants’ motion to dismiss; DENIES Mr. Powell’s motion for an extension
 6 of time; and GRANTS Mr. Powell leave to amend his complaint with respect to his
 7 claims against the Whatcom County Jail.

8 II. BACKGROUND

9 At all times relevant to the instant litigation, Mr. Powell was detained in the
 10 Whatcom County Jail awaiting trial. (*See, e.g.*, Compl. at 4; Whatcom MTD at 3;
 11 Bellingham MTD at 2¹.) Mr. Powell alleges that while he was housed in the Whatcom
 12 County Jail, his cell was infested with bed bugs and he developed a rash as a result. (*See*
 13 Compl. at 4-5.) Mr. Powell states that he twice “cleaned and switched rooms, blankets[,]”
 14 and clothes” to evade the bed bugs but the bugs followed him to other cells. (*Id.* at 5.)
 15 Mr. Powell further alleges that because he was associated with the bed bugs, other
 16 detainees threatened him with violence. (*Id.*)

17 Mr. Powell submitted kites on October 29 and 31, 2019, in which he complained
 18 of rashes on his legs, buttocks, and stomach. (*See* Jones Decl. (Dkt. # 15) ¶ 7, Ex. B
 19 (“Kites”) at 10-11.²) In each of these kites, Mr. Powell attributed the rash to an allergy to

21 ¹ The court uses the page numbers in the CM/ECF header unless otherwise noted.

22 ² The court incorporates the kites by reference. The court may consider extrinsic materials on which the complaint necessarily relies without converting a 12(b)(6) motion to

1 soap and hard water and requested hydrocortisone cream. (*Id.*) Whatcom County Jail’s
 2 medical chart notes for Mr. Powell show that Mr. Powell received medical care for his
 3 rash. (*See* Resp. at 12-15 (“Medical Chart Notes”); *see also* Brock Decl. (Dkt. # 16)
 4 ¶¶ 3-4, Ex. A (“Whatcom Medical Chart Notes”).³) Specifically, medical clinic staff
 5 provided Mr. Powell with hydrocortisone cream at least twice, on November 1 and 2,
 6 2019. (Medical Chart Notes at 14.) The chart notes also show that Mr. Powell sought
 7 additional treatment for bed bugs on December 3, 4, and 12, 2019, but that medical staff
 8 found “no signs of bites or rash” on December 3, 2019 and “no medical findings” of bed
 9 bugs on December 4, 2019. (*See id* at 13.) Despite these records of medical attention,
 10 Mr. Powell asserts that “nothing was ever done about” the bed bug infestation and that
 11 the bed bugs followed him to a new facility after he was transferred there. (Compl. at 5.)

12 Mr. Powell filed a prisoner civil rights complaint on May 26, 2022, and Magistrate
 13 Judge Theresa L. Fricke granted his application to proceed with IFP status. (*See* Dkt.)
 14 Because Mr. Powell proceeds *pro se*, the court construes Mr. Powell’s pleadings
 15 liberally. *See Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987). Mr. Powell alleges
 16 that Defendants’ responses to his complaints regarding the bed bugs amounted to
 17 deliberate indifference in violation of his right under the Eighth Amendment to the

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 20 dismiss into a motion for summary judgment. (*See* Compl. at 4, 6 (discussing Mr. Powell’s
 kites)); *see also Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010).

21 ³ The court also incorporates by reference the chart notes. (*See supra* n.2.) Although
 22 both parties have submitted excerpts from Mr. Powell’s medical chart notes, the court relies on
 Mr. Powell’s version of the notes because they are more complete. (*Compare* Medical Chart
 Notes *with* Whatcom Medical Chart Notes.)

1 United States Constitution to be free from cruel and unusual punishment and that
2 Defendants' conduct violated his right to be free from cruel punishment under Article I,
3 Section 14 of the Washington State Constitution. (Compl. at 4.) Mr. Powell further
4 asserts a claim for "professional negligence." (*Id.*) In his response to the motions, Mr.
5 Powell seeks a 30-day "continuance" in order to collect affidavits from witnesses in
6 support of his claims and indicates his intent to re-file an amended complaint against the
7 Whatcom County Jail alone. (Resp. at 3-5.) Mr. Powell also separately filed a motion
8 for a 90-day continuance on November 9, 2022, stating that he could not yet access the
9 law library or receive legal mail following a transfer to a new facility and service
10 disruptions related to COVID-19. (*See* Mot. for Ext.)

11 III. ANALYSIS

12 The court reviews the standard for evaluating a motion to dismiss before turning to
13 the Defendants' motions.

14 A. Motion to Dismiss for Failure to State a Claim.

15 Federal Rule of Civil Procedure 12(b)(6) provides for dismissal when a complaint
16 "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).
17 Under this standard, the court construes the complaint in the light most favorable to the
18 nonmoving party, *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946
19 (9th Cir. 2005), and asks whether the complaint contains "sufficient factual matter,
20 accepted as true, to 'state a claim to relief that is plausible on its face,'" *Ashcroft v. Iqbal*,
21 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
22 (2007)). The court is not, however, required to accept as true legal conclusions or

1 “formulaic recitation[s] of the legal elements of a cause of action.” *Chavez v. United*
2 *States*, 683 F.3d 1102, 1008 (9th Cir. 2012). “A claim has facial plausibility when the
3 plaintiff pleads factual content that allows the court to draw the reasonable inference that
4 the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. A plaintiff
5 who brings civil rights claims under 28 U.S.C. § 1983 must “identify the specific
6 constitutional [or federal statutory] right allegedly infringed.” *Albright v. Oliver*, 510
7 U.S. 266, 271 (1994).

8 **B. The City’s Motion to Dismiss.**

9 The City argues that Mr. Powell’s claims against it must be dismissed because, in
10 relevant part, “Mr. Powell fails to articulate any facts that connect the City to his
11 incarceration at Whatcom County Jail.” (Bellingham MTD at 5-6; *see also* Compl.
12 (failing to allege any actions by the City or its employees).) Mr. Powell does not respond
13 to the City’s arguments, let alone direct the court to any facts in the complaint that would
14 allow it to draw a reasonable inference that the City is liable for any of the misconduct.
15 (*See generally* Resp.); *see also Iqbal*, 556 U.S. at 678. Under this court’s local rules, the
16 court may consider a party’s failure to oppose a motion as an admission that the motion
17 has merit. Local Rules W.D. Wash. 7(b)(2).

18 Accordingly, because Mr. Powell has not articulated any claim for relief against
19 the City, the court GRANTS the City’s motion to dismiss Mr. Powell’s complaint with
20 respect to his claims, if any, against the City.

1 **C. The Whatcom Defendants’ Motion to Dismiss.**

2 Mr. Powell has voluntarily dismissed his claims against Ms. Brock. (*See* Resp. at
3 4.) The court considers Mr. Powell’s claims against the Whatcom County Jail below.

4 1. Mr. Powell voluntarily dismisses Ms. Brock.

5 In his response, Mr. Powell states, “[I]’m willing to dismiss Breanna Brock RN,
6 BSN from this lawsuit.” (Resp. at 4.) Accordingly, the court GRANTS the Whatcom
7 Defendants’ motion to dismiss Mr. Powell’s claims against Ms. Brock without prejudice.

8 2. Mr. Powell’s alleged failure to exhaust administrative remedies is not
9 properly before the court.

10 The Prison Litigation Reform Act (“PLRA”) “requires prisoners to exhaust ‘such
11 administrative remedies as are available’ before filing suit in federal court.” *Eaton v.*
12 *Blewett*, 50 F.4th 1240, 1244 (9th Cir. 2022) (quoting 42 U.S.C. § 1997e(a)). “[F]ailure
13 to exhaust is an affirmative defense under the PLRA” and “inmates are not required to
14 specially plead or demonstrate exhaustion in their complaints.” *Jones v. Bock*, 549 U.S.
15 199, 216 (2007). Thus, a defendant may only successfully move to dismiss for failure to
16 exhaust in a Rule 12(b)(6) motion “in those rare cases where a failure to exhaust is clear
17 from the face of the complaint.” *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014).
18 Otherwise, “a defendant will have to present probative evidence . . . that the prisoner has
19 failed to exhaust administrative remedies.” *Id.* (citing *Jones*, 549 U.S. at 204).

20 Here, the Whatcom County Jail does not identify the portions of Mr. Powell’s
21 complaint that indicate that he failed to exhaust administrative remedies prior to filing the
22 instant lawsuit (*see* Whatcom Mot. at 10-11) and the court does not find that Mr.

Powell's failure to exhaust his administrative remedies is clear from the face of the complaint (*see generally* Compl.). Although the Whatcom County Jail relies on screenshots of its own grievance filing records in support of its exhaustion defense (*see* Whatcom Mot. at 10-11 (citing Jones Decl. ¶ 7, Ex. B at 17-28)), the court declines to consider those screenshots in evaluating the motion to dismiss because Mr. Powell does not rely on them in his complaint. *See* Fed. R. Civ. P. 12(d); *Daniels-Hall*, 629 F.3d at 998. Accordingly, the court DENIES the Whatcom Defendants' motion to dismiss for failure to exhaust administrative remedies as required by the PLRA because the argument is premature. The Whatcom County Jail may raise this affirmative defense, if at all, on a motion for summary judgment. *See Albino*, 747 F.3d at 1169.

3. Mr. Powell fails to state a claim for "professional negligence."

Mr. Powell asserts a claim for "professional negligence." (Compl. at 4.) Construing Mr. Powell's pleadings liberally, the court interprets this as a common law negligence claim that Whatcom County Jail failed to uphold its duty to keep Mr. Powell "in health and free from harm." *Gregoire v. City of Oak Harbor*, 244 P.3d 924, 927 (Wash. 2010) (noting that municipal jails owe a special, nondelegable duty of care to prisoners because of the custodian's complete control over detainees). The standard is one of "ordinary, reasonable care." *Matter of Pauley*, 466 P.3d 245, 260-61 (Wash. Ct. App. 2020) (citing *Kusah v. McCorkle*, 170 P. 1023, 1025 (Wash. 1918)).

To survive the motion to dismiss, Mr. Powell must allege sufficient facts to allow the court to reasonably infer that the Whatcom County Jail failed to exercise ordinary, reasonable care in preventing foreseeable bed bug infestations and responding to his

complaints. *See id.* The court concludes that Mr. Powell has not discharged this burden. (See generally Compl.) Mr. Powell’s conclusory statements that “nothing was ever done” (see, e.g., *id.* at 5) are not specific enough to state a plausible claim, see *Iqbal*, 556 U.S. at 678 (requiring that a complaint contain “more than an unadorned, the-defendant-unlawfully-harmed-me accusation”). Moreover, as discussed in greater depth below, Mr. Powell’s chart notes indicate that the Whatcom County Jail provided the medical care he requested and allowed him to clean his bedding and move to new cells. (See *infra* §§ III.C.4 & .5.) Accordingly, the court GRANTS the Whatcom Defendants’ motion to dismiss with respect to Mr. Powell’s negligence claim.

4. Mr. Powell fails to state a plausible claim that the Whatcom County Jail acted with deliberate indifference.

Mr. Powell asserts that the Whatcom County Jail acted with deliberate indifference to his complaints regarding bed bugs, in violation of his right under the Fourteenth Amendment to the United States Constitution to humane conditions of confinement. (See Compl. at 4; Resp. at 1-4); see *Farmer v. Brennan*, 511 U.S. 825, 828 (1994).⁴

To state a civil rights claim under 42 U.S.C. § 1983, a plaintiff must show (1) they suffered a violation of rights protected by the United States Constitution or created by federal statute, and (2) the violation was proximately caused by a person acting under

⁴ Although Mr. Powell asserts these rights under the Eighth Amendment (see Compl. at 4), his right to be free from cruel and unusual punishment in pre-trial detention, prior to conviction, is protected by the Fourteenth Amendment, see *Castro v. City of Los Angeles*, 833 F.3d 1060, 1067-68 (9th Cir. 2016).

1 color of state law. *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). To
 2 succeed on a claim that detention officials exhibited deliberate indifference in violation of
 3 the constitutional right to be free from cruel and unusual punishment, a pretrial detainee
 4 must show the following:

5 (1) the defendant made an intentional decision with respect to the conditions
 6 under which the plaintiff was confined; (2) those conditions put the plaintiff
 7 at substantial risk of suffering serious harm; (3) the defendant did not take
 8 reasonable available measures to abate that risk, even though a reasonable
 9 official in the circumstances would have appreciated the high degree of risk
 10 involved—making the consequences of the defendant’s conduct obvious;
 11 and (4) by not taking such measures, the defendant caused the plaintiff’s
 12 injuries.

13 *Sandoval v. Cty. of San Diego*, 985 F.3d 657, 669 (9th Cir. 2021) (*citing Gordon v. Cty.*
 14 *of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018)) (internal quotation marks omitted). To
 15 satisfy the third element, a plaintiff “must show that the defendant’s actions were
 16 objectively unreasonable, which requires a showing of more than negligence but less than
 17 subjective intent—something akin to reckless disregard.” *Id.* (internal quotation marks
 18 omitted). Moreover, “an inadvertent failure to provide adequate medical care, differences
 19 of opinion in medical treatment, and harmless delays in treatment are not enough to
 20 sustain” a claim. *Simmons v. G. Arnett*, 47 F.4th 927, 934 (9th Cir. 2022). And, although
 21 prison officials have a duty to protect prisoners from violence by other prisoners, they are
 22 only liable when they are aware of and disregard a “substantial risk of serious harm” to
 the plaintiff. *Farmer*, 511 U.S. at 833, 837-38.

Here, Mr. Powell does not plausibly allege that Whatcom County Jail officials
 failed to “take reasonable steps to abate” the risk that he would “suffer serious harm” as a

1 result of the bed bugs. *See Sandoval*, 888 F.3d at 1125. For this claim to survive a
2 motion to dismiss, Mr. Powell would have had to plausibly allege that the Whatcom
3 County Jail officials acted with “something akin to reckless disregard” when he reported
4 the alleged infestation and his rash and sought medical treatment. *Id.* But Mr. Powell’s
5 complaint contains only the conclusory allegation that “nothing was ever done” (*see*
6 Compl. at 5), which is insufficient to survive a motion to dismiss, *see Iqbal*, 556 U.S. at
7 678. Moreover, the medical chart notes on which Mr. Powell relies demonstrate that
8 within several days of requesting medical care through his kites, he received
9 hydrocortisone cream for his rashes. (*See Kites* at 10-11 (complaining of rash in late
10 October 2019); *see Medical Chart Notes* at 14 (examining rash and providing
11 hydrocortisone cream in early November 2019).) Mr. Powell was again examined by
12 medical clinic staff the following month, but staff was unable to identify any symptoms
13 consistent with bed bugs. (*See Medical Chart Notes* at 13 (finding “no signs of bites or
14 rash” on December 3, 2019, and “no medical findings” of bed bugs on December 4,
15 2019).)

16 Mr. Powell also does not allege any facts to support a reasonable inference that
17 Whatcom County Jail officials were deliberately indifferent to his complaints about the
18 alleged bed bug infestation in his cell. (*See Compl.*) To the contrary, Mr. Powell states
19 that he “cleaned and switched rooms, blankets[,] and clothes” twice to evade the bed
20 bugs, which implies, at minimum, the consent and cooperation of the Whatcom County
21 Jail. (Compl. at 5.) Finally, Mr. Powell does not allege that Whatcom County Jail
22 officials were aware of the threats of violence from other inmates, that those threats

1 constituted a substantial risk of serious harm, or that the officials failed to protect him
2 from any credible threats. (*See id.*)

3 Even construing the facts in Mr. Powell's favor and his pleadings liberally, the
4 court cannot conclude that Mr. Powell plausibly pleads that Whatcom County Jail
5 officials were deliberately indifferent to his medical needs or complaints about the
6 conditions of his confinement in violation of his constitutional rights. Accordingly, the
7 court GRANTS the Whatcom Defendants' motion to dismiss with respect to Mr.
8 Powell's "deliberate indifference" claim.

9 5. Mr. Powell fails to state a plausible claim that the Whatcom County Jail
10 violated his right to be free from "cruel punishment."

11 Unlike the United States Constitution, the Washington State Constitution prohibits
12 inhumane conditions of confinement regardless of the detention officials' state of mind.
13 *See Matter of Williams*, 496 P.3d 289, 302-03 (Wash. 2021) (explicitly rejecting federal
14 deliberate indifference standard). To successfully assert that conditions of confinement
15 violate the Washington State Constitution's guarantee against cruel punishment, a
16 detainee must show: "(1) those conditions create an objectively significant risk of serious
17 harm or otherwise deprive them of the basic necessities of human dignity and (2) those
18 conditions are not reasonably necessary to accomplish any legitimate penological goal."
19 *Id.* at 304.

20 Mr. Powell fails in the first prong. Mr. Powell has not plausibly alleged that the
21 Whatcom County Jail's responses to his complaints about bed bugs posed an "objectively
22 significant risk of serious harm." *See id.* Mr. Powell sought and received medical care

1 for his rash and moved to a new room on two separate occasions. (*See* Medical Chart
2 Notes at 13-14; Compl. at 5.) Mr. Powell does not plausibly allege that the threats of
3 violence from other inmates were sufficiently severe or credible to pose objectively
4 significant risks of serious harm. (*See* Compl. at 5 (stating only that he “was threatened
5 with violence”).) On these facts, the court cannot conclude that Mr. Powell was
6 objectively at risk of serious harm and thus it need not reach the second prong of the
7 analysis. Accordingly, the court GRANTS the Whatcom Defendants’ motion with
8 respect to Mr. Powell’s state constitutional claim for cruel punishment.

9 **D. Leave to Amend and Mr. Powell’s Request for a Continuance.**

10 A district court that dismisses a claim under Rule 12(b)(6) should generally grant
11 leave to amend “unless it determines that the pleading could not possibly be cured by the
12 allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting
13 *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). The court dismisses Mr.
14 Powell’s complaint with respect to the City of Bellingham without leave to amend
15 because the complaint does not assert any claims against the City that could be cured by
16 amendment. The court, however, dismisses without prejudice and with leave to amend
17 Mr. Powell’s claims against the Whatcom County Jail.

18 If Mr. Powell continues to pursue his negligence claim against the Whatcom
19 County Jail, he must include in his amended complaint short, plain statements articulating
20 how Whatcom County Jail officials failed to exercise reasonable care in protecting his
21 health and safety. *See Matter of Pauley*, 466 P.3d at 260-61; Fed. R. Civ. P. 8(a)
22 (requiring a complaint to contain “a short and plain statement of the claim showing that

1 the pleader is entitled to relief”). If Mr. Powell continues to pursue his Section 1983
2 “deliberate indifference” claim against the Whatcom County Jail, he must name as
3 defendants the specific official or officials who he alleges violated his constitutional
4 rights, and include short, plain statements setting forth (1) how his conditions of
5 confinement posed a substantial risk of serious harm, (2) that the officials were aware of
6 the substantial risk of serious harm but failed to act or acted in a way that caused his
7 injury, and (3) the specific injuries he suffered as a result of the officials’ conduct or
8 omissions. *See Sandoval*, 985 F.3d at 669. If Mr. Powell continues to pursue his “cruel
9 punishment” claim against Defendant Whatcom County Jail, he must include short, plain
10 statements alleging that his conditions of confinement objectively posed a substantial risk
11 of serious harm and served no penological purpose. *See Matter of Williams*, 496 P.3d at
12 302-03. The court further reminds Mr. Powell of his obligations to exhaust
13 administrative remedies prior to filing suit under the PLRA. (*See supra* § III.C.2.)

14 Mr. Powell’s motion for extension of time does not respond to any motion by
15 Defendants or order of the court and does not articulate a cognizable claim for relief.
16 (*See Mot. for Ext.*) Accordingly, the court finds that no response from Defendants is
17 necessary and DENIES Mr. Powell’s motion. However, to allow Mr. Powell sufficient
18 time to prepare his amended complaint, the court ORDERS Mr. Powell to file his
19 amended complaint, if any, no later than January 31, 2023.

20 IV. CONCLUSION

21 For the foregoing reasons, the court orders as follows:
22

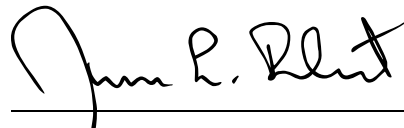
1 (1) The court GRANTS the City of Bellingham's motion to dismiss and
2 DISMISSES the City of Bellingham without prejudice and without leave to amend (Dkt.
3 # 18).

4 (2) The court GRANTS in part and DENIES in part the Whatcom Defendants'
5 motion to dismiss (Dkt. # 14). Specifically, the court (a) DENIES the Whatcom
6 Defendants' motion to dismiss for failure to exhaust administrative remedies;
7 (b) GRANTS the Whatcom Defendants' motion with respect to each of Mr. Powell's
8 legal claims without prejudice and with leave to amend; and (d) DISMISSES Ms. Brock
9 from this action without prejudice.

10 (3) The court DENIES Mr. Powell's motion for an extension of time (Dkt.
11 # 25).

12 (4) The court GRANTS Mr. Powell leave to amend his complaint and
13 ORDERS Mr. Powell to file his amended complaint, if any, no later than **January 31,**
14 **2023.** If Mr. Powell fails to timely file an amended complaint that remedies the
15 deficiencies identified above, the court will dismiss his remaining claims against the
16 Whatcom County Jail with prejudice.

17 Dated this 21st day of December, 2022.

18
19 

20 JAMES L. ROBART
21 United States District Judge
22